UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

PARKLAND AMBULANCE SERVICE d/b/a
MOHAWK AMBULANCE SERVICE

Employer

And **Case 03-RC-220639**

UNITED PROFESSIONAL AND SERVICE
EMPLOYEES UNION LOCAL 1222

Petitioner

DECISION AND ORDER DISMISSING PETITION

As discussed below, based on the record and relevant Board law, I find that the petitioned-for unit of the Supervisors consists of individuals who are supervisors under Section 2(11) of the Act based primarily on the Supervisors' ability to discipline employees, effectively recommend discipline, and to discharge employees. Accordingly, I am dismissing this petition as it fails to raise a question concerning representation.

The Employer operates six ambulance stations in the State of New York. Specifically, the Employer operates two stations in Albany and one each in Brunswick, Glenville, Schenectady and Troy. The Employer's headquarters and dispatch facility are located at a separate facility in Schenectady. The ambulance stations operate on a 24-hour, seven-day a week basis, providing emergency and non-emergency medical treatment and transportation via the Employer's 40 ambulances and six Alternative Transport Services (ATS) vans. The Employer's operational staff includes a Director of Operations, an Assistant Director of Operations, two Regional Managers, eight Chief Supervisors, an ATS Supervisor,[1] 33 individuals holding the title of "Supervisor,"[2] and approximately 240 paramedics, EMTs, ATS drivers and dispatchers.[3]

[1] The parties stipulated during the course of the hearing that the sole ATS Supervisor is a supervisor within the meaning of Section 2(11) of the National Labor Relations Act (the Act), based on that individual's ability to hire.
[2] Unless otherwise stated, the term "Supervisor" refers to individuals employed by the Employer who hold this title. It should be noted that the parties disagree on the actual number of individuals holding the title of Supervisor. In light of my ultimate conclusion that the Supervisors are not employees under the Act, I need not resolve this dispute.
[3] The Petitioner was certified as the representative of a unit of the Employer's paramedics, EMTs, ATS drivers and dispatchers on June 30, 2015. References to "bargaining unit employees" should be taken to mean the employees in the bargaining unit already represented by the Petitioner. The parties have a collective-bargaining agreement covering these employees that is effective from April 15, 2015 through March 31, 2018.

The paramedics and EMTs are assigned in pairs to ambulances. The ATS drivers are each assigned to a van and work individually. Supervisors are also either EMTs or paramedics. The Supervisors are, as are bargaining unit employees with the same medical certifications, assigned to ambulances for the duration of their shifts. It should be noted that employees are not confined to ambulances for the entirety of each shift. Rather, employees spend the time that they are not responding to calls at their respective stations.

The unit sought by the Union in this matter, as clarified via a stipulation by the parties at the hearing, is as follows:

> All full-time and regular part-time supervisors employed by the Employer at its State Street Schenectady, Kings Road Schenectady, Quail Street Albany, Troy, Central Ave. Albany, Brunswick, and Glenville, New York locations, excluding office clerical employees, chief supervisors, regional managers, directors of operations, assistant directors of operations, all other managers, guards, professional employees and supervisors as defined in the Act, and all other employees.

The sole issue in dispute is whether the Supervisors are supervisors under Section 2(11) of the Act. The Employer claims that these Supervisors exercise supervisory authority over the bargaining unit employees by adjusting employee work schedules, disciplining, discharging and suspending employees, recommending employees for hire, remedying grievances and by assigning work. The Petitioner argues that the Supervisors do not possess supervisory authority because their roles with respect to any applicable supervisory functions are routine and reportorial, not requiring the independent judgment required for a finding of supervisory authority under the Act.

A. Board Law

Supervisors are explicitly excluded from coverage under the Act. Section 2(11) of the Act defines a supervisor as:

> any individual with the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 711 (2001); *Shaw Inc*., 350 NLRB 354, 355 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Croft Metals*, 348

NLRB at 721; *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006). To establish that individuals are supervisors, the asserting party must show: (1) that the purported supervisors have the authority to engage in any one of the twelve enumerated supervisory functions; (2) that their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) that their authority is exercised "in the interest of the employer." *Kentucky River Community Care,* 532 U.S. at 710-713. It is not required that the individual in question actually exercise this authority, as the possession of such authority is all that is required by Section 2(11). *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007), and cases cited therein.

A lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities,* 329 NLRB 535, 536 fn.8 (1999). Purely conclusory evidence is insufficient to establish supervisory status. *Community Education Centers, Inc.*, 360 NLRB 85, 90-91 (2014), citing *Volair Contractors,* 341 NLRB 673, 675 (2004).

B. Application of Board Law to this Case

In reaching the conclusion that the Supervisors are statutory supervisors, I rely on the following record evidence and analysis. Although the record contains evidence and argument that Supervisors have the authority to promote employees and assign work to employees, the parties' arguments and the record evidence is largely centered on the Supervisors' roles in effectively recommending discipline, disciplining and discharging employees. It is upon those indicia that I rely in concluding that Supervisors are supervisors within the meaning of Section 2(11) of the Act. Several secondary indicia support my conclusions in this regard.

1. Ability to Discharge

The Employer contends that Supervisors have the ability to discharge employees in circumstances when an employee is insubordinate in response to a direct order from a Supervisor.

The record evidence regarding Supervisors' ability to discharge insubordinate employees includes statements made by owner James McPartlon at several "Supervisors' Meetings" held in 2017. The meetings in question took place on April 4 and June 28, 2017, according to agendas and sign-in sheets for these meetings submitted into evidence by the Employer. Director of Operations Daniel Gilmore, Chief Supervisor Jovan Cruz, Supervisors Sean Carmody and

Jennifer Stroman testified about their recollections of these meetings.[4] Each of these witnesses testified that the issue of the Supervisors' ability to combat insubordination, although not appearing on the agenda for either meeting, was raised by the Supervisors. All four testified that McPartlon unequivocally stated that Supervisors were not only allowed to discharge an employee who refused to follow the orders of a Supervisor, but were expected to do so.[5]

Cruz, a Chief Supervisor assigned to one of the Albany ambulance stations, testified that his duties include training new Supervisors. He asserted one of the lessons he imparts to new Supervisors is the expectation they will discharge employees who refuse to follow their commands. Cruz asserted that his expectations in this regard are based on the expectations set forth by McPartlon during the 2017 Supervisors' Meetings.

The ability to discharge employees is one of the enumerated functions of a supervisor in Section 2(11) of the Act. The testimony above conclusively establishes that an authority, no lower than the Employer's owner, bestowed upon Supervisors the ability to terminate employees for insubordination.[6] While it is undisputed that no employee has recently been terminated for insubordination, the record evidence establishes that the paucity in terminations is linked not to lack of authority by Supervisors but rather the rarity of an instance in which an employee was insubordinate.[7]

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[4] Gilmore affirmatively identified the meeting at which he heard McPartlon's statements as the June 28, 2017 meeting. While Stroman attested that she did not recall at which meeting McPartlon made these statements, a review of Employer's Exhibit 24 (an agenda and sign-in roster for the June 28, 2017 meeting) and Employer's Exhibit 26 (the agenda and sign-in roster for the April 4, 2017 meeting) demonstrate that Stroman attended the April 4 meeting but not the June 28 meeting. Carmody similarly did not recall the date of the meeting he attended, although he testified that he believed it occurred within six months of his promotion to Supervisor. As Carmody was promoted in October 2016 and attended the April 4 meeting, it is reasonable to conclude that the April 4 meeting was the one to which he was referring. Similarly, although Cruz did not identify the date of the meeting at which McPartlon made these statements, he recalled them being made in a Supervisors' Meeting. Cruz's name appears on the sign-in rosters for both the April 4 and June 28, 2017 meetings.

[5] I note that Supervisor Alexander Downey, called as a witness by the Petitioner, testified that he was also present at the April 4, 2017 meeting but did not refute the testimony of the above witnesses.

[6] Paramedic Michael LaPorta testified about a March 26, 2018 bargaining session during which Union Representative Daniel Schuttig asserted that all termination decisions had to be approved by McPartlon, and that he recalled McPartlon agreeing with Schuttig's statement. However, I note that Gilmore, who was also in attendance, vociferously disagreed with this recollection and testified that McPartlon instead asserted that Supervisors were fully authorized to terminate employees. Given the incongruous nature of Gilmore and LaPorta's recollections, I do not rely on testimony about this bargaining session in reaching my conclusions regarding the ability of Supervisors to discharge employees, particularly given that the testimony related to McPartlon's statements at the 2017 Supervisors' Meetings is uncontroverted.

[7] The only record evidence regarding an employee's insubordination, as testified to by Stroman, involved an employee being insubordinate to a manager and did not involve a Supervisor. I give no weight to the testimony provided by EMT Supervisor Ernest Bebernitz regarding his attempt to discharge an employee who ripped up a disciplinary form, as this incident occurred approximately 18 years ago. I also note that to the extent such an

As noted above, a supervisor need only possess the authority to perform one of the enumerated functions; he or she need not have actually exercised this authority to be considered a supervisor. In *Sheraton Universal Hotel*, supra, the Board found that a disputed individual was a supervisor within the meaning of Section 2(11) of the Act because she had the ability to effectively recommend against hiring an applicant, despite lack of record evidence that the individual had made a negative recommendation. The Board relied on the "unequivocal" testimony of the employer's manager that a recommendation not to hire would be "fatal" to the applicant's chances for hire. *Id.* A similar situation is present here. The undisputed testimony of Stroman, Carmody, Cruz and Gilmore demonstrates that the Employer's expectation is that Supervisors discharge employees for insubordination. That the Supervisors have not had recent need to exercise this authority is of no moment.

The facts of this case are similar to those in *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 660-661 (2007). There, the Board rejected the underlying finding by the Administrative Law Judge that an individual holding the title of Maintenance Manager was not a supervisor within the meaning of Section 2(11) of the Act. The Board noted that the employer's highest-ranking official, its president, personally informed the Maintenance Manager that he had the right to discipline or discharge employees for not following his orders,[8] and further communicated this expectation to the rest of the managerial staff at a later meeting. The Board held that this evidence was sufficient to establish that the Maintenance Manager was suffused with authority to discharge employees and thus was a supervisor within the meaning of Section 2(11) of the Act. *Id.* The Board contrasted its decision with *Avante at Wilson*, 348 NLRB 1056, 1057 (2006), where the Board found insufficient evidence of supervisory authority because the purported supervisor was never informed by her superiors that she had said authority.

Similarly, in the instant case, McPartlon's statements to the Supervisors and assembled managers at the 2017 Supervisors' Meetings clearly conveyed his expectation that the Supervisors were empowered to discharge an employee in the event that employee, like the employee in *Metropolitan Transportation Service*, failed to follow the Supervisor's orders.

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incident can be given weight, it seems to support the inference that Supervisors can discharge employees, as the employee was only returned to work after Bebernitz was *asked* to relent.

[8] Specifically, the president told the Maintenance Manager, in the context of an employee's refusal to change a tire at the Maintenance Manager's direction, "[t]hese guys work for you. You go out there and you tell them that they are to get the tire changed on the vehicle and if any one of them refuses you, you are to send them home or terminate them." *Id.*

The facts of this case are distinguishable from that of *Lucky Cab Co.*,[9] and its ilk, to the extent those cases stand for the proposition that job descriptions and handbook sections giving mere "paper authority" to perform one of the enumerated functions are insufficient to establish supervisory status. In *Lucky Cab Co.*, the Board rejected such paper authority "in light of the contrary evidence of the road supervisors' actual practice." *Id*. By contrast, in the instant matter, McPartlon's statements to the Supervisors at the 2017 meetings regarding their ability to discharge employees for insubordination are not contradicted by any evidence in the record. Moreover, such unequivocal testimony regarding McPartlon's statements are distinct from the type of "purely conclusory evidence" deemed insufficient to establish supervisory status in *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Thus, for the above reasons, I conclude that the Supervisors are supervisors within the meaning of Section 2(11) of the Act based on their ability to discharge employees.

2. Ability to Discipline and Effectively Recommend Discipline

a. *Authority to Discipline and Effectively Recommend Discipline*

The Employer also contends that Supervisors have the authority to discipline and effectively recommend discipline for EMTs and paramedics.

To establish that an individual or group of individuals has supervisory status based on the authority to recommend discipline, a party must provide specific evidence of that authority. *Golden Crest Healthcare Center*, 348 NLRB at 731, fn.10 (2006). The evidence must show that the individual's role is not merely reportorial. *Berthold Nursing Care Center*, 351 NLRB 27, 28 (2007). That is, the recommendation must not be subject to independent investigation by upper management. *DirecTV*, 357 NLRB 1747, 1749 (2011), citing *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007). Further, the mere authority to warn an employee, without a tangible effect on that employees' job status, is insufficient to establish supervisory status. At a minimum, the action must lay a foundation for future discipline against an employee. *See Berthold Nursing Care Center, Inc.*, 351 NLRB at 28.

The record evidence adduced at the hearing regarding the Employer's disciplinary process is as follows: while the Employer does not have a written policy and the parties' collective-bargaining agreement merely sets forth the requirement that discipline be for "just cause," the Employer nonetheless maintains an unwritten progressive discipline policy. Indeed,

[9] 360 NLRB 271, 272 (2014), citing *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

the Employer maintains a document, described by Gilmore as an Excel spreadsheet, listing each bargaining unit employee and the level of discipline, if any, the employee has previously received. While the record is somewhat unclear as to whether each Supervisor has access to this spreadsheet,[10] it is undisputed that this spreadsheet is the Employer's method of recording an employee's recent disciplinary history, which Gilmore testified could affect the level of discipline issued to an employee for repeated misconduct.

Gilmore and Gardner both testified that from a management perspective, they expect Supervisors to be responsible for disciplining employees. Director of Human Resources Anne DeVost testified that during recent interviews with candidates for open Supervisor positions, one of the chief concerns of the management officials interviewing the candidates[11] was whether they were comfortable disciplining bargaining unit employees. DeVost asserted that the candidates were told that disciplining employees was part of the job duties of a Supervisor. Chief Supervisor Cruz corroborated the assertions of Gilmore, Gardner and DeVost, attesting that he expected a Supervisor to, in the event that an employee is acting improperly or not following the Employer's policies, to "deal with it." He elaborated that it was up to the Supervisor to determine first, whether the conduct of the employee in question required a discipline and, if so, what level of discipline was appropriate. Cruz acknowledged that Supervisors are free to consult with him for "guidance," but asserted that doing so was not a requirement.

Carmody corroborated the testimony of the Employer's management witnesses. He testified that it was his responsibility to discipline employees for rules violations. He asserted that he has disciplined multiple employees on multiple occasions in the course of his duties as Supervisor, adding that he has regularly done so without first seeking input from higher-level managers. Carmody was asked about and identified several disciplines he levied on employees: specifically, he identified a verbal counseling, a written warning, and a final written warning all issued to an employee in October 2017 due to the employee's repeated failure to properly complete patient care records ("PCRs"). Carmody testified that for each of these disciplines, he did not seek nor secure permission from his superiors prior to their issuance.

[10] Gilmore testified that he believed each Supervisor could access this spreadsheet, but that he was not "a hundred percent sure" that all Supervisors had access. Stroman and former Supervisor Jevonte Osterhout, however, both testified that they did not have access to the spreadsheet.

[11] It should be noted that the candidates for these Supervisor positions were all bargaining unit employees at the time of the interviews.

Carmody testified that he also issued a written warning and a final written warning in July 2017 to a second employee for repeated failure to properly complete PCRs. Again, Carmody testified that he issued these disciplines to the second employee without consultation or feedback from anyone above him in the Employer's hierarchy. Both the first and second employees were ultimately terminated by the Employer. Gilmore testified that with respect to the first employee, the Employer relied on the disciplines issued by Carmody as part of its rationale in deciding to terminate the employee for continued failures to complete required paperwork.[12] Similarly, Gardner testified that while the decision to terminate the second employee was made by Regional Manager Brandon Hermance, his decision was influenced by the disciplinary notices issued to that employee by Carmody.

Stroman also testified that she too had the ability to discipline employees, and testified regarding a verbal warning she issued to an employee on May 1, 2018 for failing to properly clean and restock an ambulance at the conclusion of the employee's shift. She attested that she did not consult or secure permission from management officials before issuing this discipline to the employee in question. Stroman also testified about her involvement in an issue occurring on May 10, 2018. Stroman asserted that while working for her local fire department, she noticed a Mohawk Ambulance employee who responded to the call while wearing a baseball cap, a violation of the Employer's uniform policy. She testified that she had a non-disciplinary conversation about the issue with the employee and, upon being satisfied with the employee's response to this conversation, decided not to issue discipline to the employee.[13]

Although this testimony demonstrates that higher-level managers such as Hermance and DeVost are occasionally notified of incidents warranting discipline and sometimes participate in the disciplinary process, it further confirms that Supervisors are responsible for initiating the disciplinary process. Indeed, each of the Supervisors who testified confirmed that they are responsible for observing what is happening in their respective stations and for ensuring that employees are properly performing their duties. For example, former Supervisor Osterhout testified that that he was responsible for crews at his station, including ensuring that EMTs and paramedics perform work that needs to be done. Similarly, Supervisor Downey also noted that

[12] I note that Gilmore testified that the Employer's business office is responsible for flagging incomplete PCRs, but the decision about whether to discipline the two employees, and the level of discipline to issue, was Carmody's.
[13] Stroman's recollection is buttressed by a contemporaneous email sent to DeVost on May 10 regarding the incident, which Stroman testified she had sent merely to give DeVost a "heads-up."

part of his duties were to ensure that employees were, for instance, complying with the Employer's uniform requirements and otherwise ensuring that employees were completing their job duties.

Documentary evidence supports this testimony. Through the course of this hearing, the Employer admitted 14 disciplines[14] as examples of employee disciplinary actions executed by Supervisors. The disciplines include verbal counselings for first offenses, written warnings for second offenses, and final written warnings for third offenses. Each discipline includes a detailed, handwritten description of the basis for the disciplinary action and identifies the rule that the conduct violated. Several of the disciplines completed by a Supervisor provide specifics regarding the incident surrounding their exercise of authority and the procedure that was followed. Contrast this evidence with, for instance, the evidence in *Avante at Wilson*, supra, where the Board held that testimony regarding staff nurses' authority to discipline was insufficient because it lacked specifics regarding asserted incidents of exercise of such authority such as time, identity of those involved, and details of the circumstances.

This record evidence and the consistent testimony of Employer and Petitioner witnesses support the conclusion that Supervisors have the authority to effectively recommend discipline of EMTs and paramedics. The evidence demonstrates that they draft write-ups without independent investigations by upper management. Indeed, in many cases, the Supervisor issues discipline to employees without first notifying management. See *The Republican Co.,* 361 NLRB No. 15, slip op. at 8 (2014); *Sheraton Universal Hotel,* 350 NLRB at 1116; *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), *enfd. in pertinent part* 317 F.3d 316 (D.C. Cir. 2003). The fact that Supervisors will sometimes relay the disciplines to Chief Supervisors or Regional Managers or contact Human Resources prior to documenting a discipline does not detract from that point. Indeed, the testimony demonstrates that these management officials routinely accept the Supervisors' decision and generally do not dissuade or override Supervisors who inform them of a disciplinary situation. No evidence was presented demonstrating that the Employer's Chief Supervisors and Regional Managers conduct independent investigations into reports of misconduct by unit employees, demonstrating that the Employer relies on the Supervisors' account of the facts in disciplinary situations. This case is similar in that regard to the Board's

[14] These 14 disciplines do not include several other disciplines relating to actions issued by Gregory Williams, an individual that the parties stipulated was a supervisor within the meaning of Section 2(11) of the Act.

decision in *Mountaineer Park*, 343 NLRB 1473 (2004), in which supervisory status was found where higher-level management routinely "signed off" on disciplinary recommendations and followed all recommendations without any investigation.

Carmody's issuance of discipline to the two employees referenced above prior to their terminations is particularly illuminating. The undisputed evidence is that the Employer relied on the lower-level counselings and warnings issued to these employees by Carmody in deciding to terminate their employment. In *Berthold Nursing Care Center, Inc.*, the Board held that an LPN's authority to fill out counseling forms constituted a form of discipline because the forms lay a foundation for future discipline against an employee. 351 NLRB at 28, citing *Promedica Health Systems*, 343 NLRB 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), cert. denied 127 S. Ct. 2033 (2007).

Accordingly, because Supervisors monitor EMT and paramedic compliance with workplace rules, fill out, sign off on, and issue disciplinary forms, and because there is no evidence that upper management conducts an independent investigation of disciplinary matters or overrides the Supervisors' assessments that conduct warrants discipline, the record evidence supports the conclusion that Supervisors have the authority to discipline and to effectively recommend discipline of bargaining unit employees.

b. *Exercise of Independent Judgment*

The Employer contends that exercise independent judgment in disciplining and effectively recommending discipline of EMTs and paramedics.

In *Oakwood Healthcare,* the Board set forth a definition of "independent judgment" under the Act. It explained, "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." 348 NLRB at 693. The Board articulated the relevant test, indicating that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Id.* That is, the action "must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Id*.

Here, the record demonstrates that discipline originates with the Supervisors who observe or investigate the occurrence at issue. The Supervisors' duties specifically include inspection of

the station and ambulances to ensure that the employees are complying with workplace rules and policies. While the Supervisors may contact upper management for input before issuing discipline, neither the Chief Supervisors nor the Regional Managers perform independent investigations of the conduct reported by the Supervisors. The Supervisors initiate the disciplinary process by observing a violation of a rule or policy and, in many instances, filling out the disciplinary form. On this form, the Supervisor indicates the level of discipline based on the progressive disciplinary policy, taking into account the severity of the conduct and providing a description of what happened. For example, Supervisor Josh Colvin indicated that an employee was receiving a final written warning for using excessive speed while driving through a toll booth. Similarly, Supervisor Stroman noted that an employee was receiving a verbal warning for leaving his ambulance dirty and failing to properly restock the ambulance's supplies. Both warnings clearly identify the conduct which resulted in discipline and noted that further misconduct could result in the issuance of further progressive discipline. This type of authority is consistent with that in *ExtendiCare Homes, Inc.*, 348 NLRB at 1064, where the Board found that LPNs exercised independent judgment and had supervisory status where they initiated the disciplinary process and filled out forms as part of a progressive disciplinary policy without independent investigation by management.[15]

Further, the Employer submitted evidence, corroborated by the testimony of the Supervisors, that the discipline issued by Supervisors is relied upon in the Employer's progressive disciplinary policy and will form the foundation for future disciplinary action if additional misconduct occurs. For example, several disciplines issued by Supervisor Carmody to an employee regarding the employee's failure to complete PCRs demonstrate escalating disciplinary action. Whereas the first disciplinary form, issued to the employee on October 16, 2017 is identified as a verbal written warning, the second disciplinary form, issued on October 26, 2017 is a written warning.[16] The progressive severity of this discipline establishes a "clear connection" between the corrective action notice and "other disciplinary measures." *Ken-Crest*

[15] While the Petitioner stressed that the disciplinary forms issued by Supervisors contain a line for signature indicating that the Director of Operations or the Director of Human Resources reviewed the discipline, the undisputed testimony is that this line is signed by the proper official *after* issuance of the discipline to the employee. This is insufficient evidence that the Employer independently investigates reports of misconduct and disciplines issued by the Supervisors.

[16] The third discipline, issued to the employee on October 26, 2017, escalated the level of admonishment to a final written warning. The verbal warning and the written warning state that "[f]urther disregard for this policy will result in progressive discipline…"

Services, 335 NLRB 777, 778 (2001). Unlike the employer's system in *Ken-Crest*, where lower-level discipline such as verbal warnings do not serve as a basis for further disciplinary action, the warnings issued by Supervisors in the instant case clearly serve to set the stage for more serious discipline in the event of further intransigence by an employee.

The Petitioner argues that the Supervisors do not exercise independent judgment insofar as the policies that the Supervisors purportedly enforce require little interpretation. The Petitioner contends that the Employer's maintenance of a spreadsheet to track progressive discipline, as well as the workplace rules spelled out in the Employee Handbook and other manuals provide Supervisors with a clear checklist to follow such that they need not exercise independent judgment. However, the fact that the Employer maintains specific workplace policies and rules does not preclude the exercise of independent judgment in this case because the rules at issue allow for discretionary choices. See *Oakwood Healthcare*, 348 NLRB at 693 ("[T]he mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.") The Employer's disciplinary forms clearly provide a number of categories of which an employee can run afoul. While some of these categories, such as "Tardiness/Absence" are relatively black and white, there are also the more nebulous categories of "Inadequate Job Performance" and "Insubordination."

Additionally, independent judgment is not limited solely to determining what level of discipline is warranted. The Board has held that a decision about whether an employee's conduct rose to the level that required discipline constitutes independent judgment. *Progressive Transportation Services*, 340 NLRB at 1046. Such is clearly the case here. For example, a Supervisor issued a verbal counseling to an employee for failing to wear a uniform shirt while on duty. The discipline form noted that the employee had been spoken to on several previous occasions about uniform violations, clearly indicating that the Supervisor who issued the discipline made the decision that the employee's failure to heed previous conversations required escalation of the issue to a verbal counseling. Similarly, Stroman's testimony regarding her interaction with an employee who wore a baseball cap while responding to a call indicates the use of independent judgment. Although the employee was clearly in violation of the Employer's uniform policy, Stroman elected not to discipline the employee given the employee's contrition during Stroman's conversation with him, demonstrating an independent exercise of judgment in so doing.

Accordingly, the record evidence demonstrates that Supervisors use independent judgment in disciplining and effectively recommending discipline of EMTs and paramedics.

c. In the Interest of the Employer

The record evidence further supports the conclusion that the Supervisors authority in disciplining and effectively recommending discipline of EMTs and paramedics is held in "the interest of the employer." NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001). The Board holds that actions taken by a purported supervisor that are principally in his own interests are not performed in the interest of an employer as required by Section 2(11). There is no evidence that this is the case here. *See, e.g.*, *Shaw, Willis, Frozen Food Express, Inc.*, 173 NLRB 487, 488 (1968), (head drivers' recruitment and selection of assistants was "principally in [the drivers'] own interest to ensure a harmonious relationship between themselves and their assistants" and was not in the interest of their employer). The role of a Supervisor, to which all Supervisors attested, is to ensure that the ambulance stations ran efficiently and effectively. There is no evidence that this role, which includes the ability to effectively recommend discipline of employees and, under certain circumstances, to discharge them, is incompatible with the Employer's interests.

Consequently, I find that the Supervisors in the petitioned-for unit are supervisors under Section 2(11) of the Act because they discipline and effectively recommend discipline of bargaining unit employees.

3. Secondary Indicia

While secondary indicia can be a factor in demonstrating statutory supervisory status, absent the putative supervisors possessing any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest Healthcare,* 348 NLRB at 730, fn.10; *Ken-Crest Services,* 335 NLRB at 779. Because I have found that the Employer has established primary indicia of supervisor status in this case, I now note secondary indicia that reinforce this conclusion.[17]

I note that the Supervisors, while generally having the same uniform requirements as bargaining unit employees, have a stripe on the left sleeve of their uniforms containing the word "Supervisor." Additionally, while both bargaining unit employees and Supervisors wear a

[17] I do not rely on the job description of the Supervisors entered into the record by the Employer. Testimony related to these job descriptions clearly establish that the Employer recently revised these descriptions and that they have not been issued to the Supervisors; thus, they have little evidentiary weight.

symbol on their collars called a caduceus, the bargaining unit employees' are silver and the Supervisors' are gold. Paramedics wear an occupation-specific symbol on their collars; again, however, this symbol is silver for bargaining unit employees and gold for Supervisors. The Board has held that differences in uniform, where the difference clearly indicates the individual's supervisory status, can be used as secondary indicia of supervisory status. See, e.g., *Sheraton Universal Hotel*, 350 NLRB at 1118 (name tag titled "supervisor" useful as secondary indicia). The same is true here, where the sleeve stripe clearly indicates which employees are Supervisors and the color-coded caduceus and paramedic emblems serve a similar purpose.

Additionally, the evidence is undisputed that the Employer holds Supervisors' Meetings that are attended by managers and Supervisors, but not bargaining unit employees. Participation in supervisors' meetings, like distinctions in uniforms, is one of the secondary indicia that may be appropriately used to buttress a finding of supervisory status. See *McClatchy Newspapers*, 307 NLRB 773, 733 (1992). I therefore rely on the Supervisors' attendance at these meetings as a secondary consideration for my determination that the Supervisors are supervisors within the meaning of Section 2(11) of the Act.

Based on the above and extant Board law, I find that the Employer has met its burden of demonstrating that the Supervisors in the petitioned-for unit are supervisors within the definition of Section 2(11) of the Act. Accordingly, I shall dismiss the petition.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization with the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. The petitioned-for bargaining unit is inappropriate insofar as it consists of individuals who are supervisors within the meaning of Section 2(11) of the Act.
5. The petition is hereby dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days

after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: this 22nd day of June, 2018.

/s/ Linda M. Leslie

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